IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No._____

GARY BROTT, a Minor,
by his Guardian ad litem,

Petitioner,

vs.

ST. FRANCIS HOSPITAL
OF LYNWOOD, et al.,

Respondent.

PETITION FOR A WRIT
OF CERTIORARI TO THE

COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT,
DIVISION TWO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner prays a Writ of Certiorari issue to review judgment of the California Supreme Court entered March 6, 1975.

CITATIONS TO OPINION BELOW

The Opinion of the California Court of Appeal (Appendix A), is unreported. It was

certified for nonpublication (Appendix B, p. 14) and filed on January 8, 1975.

JURISDICTION

The unreported California Court of Appeal judgment (Appendix A) was entered on January 8, 1975. A Petition for Rehearing was denied by the California Court of Appeal on January 30, 1975. Petition for Hearing to the Supreme Court of California was denied on March 6, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

QUESTION PRESENTED

1. Is Section 10, Article VI of the California Constitution, as applied herein, a denial of Due Process and therefore unconstitutional.

STATE LAW INVOLVED

The State Constitutional provision involved is Section 10, Article VI of the California Constitution.

STATEMENT

Petitioner, now severely retarded, mentally and physically, was born in Respondent hospital. Petitioner presented evidence that these abnormalities were caused by hypoxia: an insufficiency of oxygen reaching the brain.

Petitioner's counsel contended negligence on the part of Respondent hospital's nurse in failing to properly monitor fetal vital signs. Petitioner's counsel further contended that Respondent hospital and its counsel had wilfully concealed from Petitioner the name and whereabouts of the nurse in question for twenty-nine months and until two days prior to trial, and the fact of her participation in Petitioner's mother's pre-natal care until the seventh day of trial.

It was Petitioner's contention at trial that the negligence of this nurse was the efficient, proximate cause of Petitioner's severe mental and physical retardation.

The trial court, ostensibly acting pursuant to the authority bestowed upon a trial judge by Section 10, Article VI of the California Constitution, instructed the jury in the following manner [Rep. Tr. 2512]:

> "I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest how you should decide any questions of fact submitted to you.

"If anything I have done or said has seemed to you to so indicate, you will disregard it and form your own opinion.

"At this time, however, and for the purpose of assisting you in properly deciding this case, I am permitted by the Constitution of California to comment on the evidence and the testimony and credibility of any witness.

"My comments are intended to be advisory only and are not binding on you as you must be the exclusive judge of the questions of fact submitted to you and of the credibility of the witnesses.

"You may disregard any or all of my comments if they do not coincide with your views of the evidence and the credibility of the witnesses.

"My comments will be limited to only one aspect of the evidence -- that is, the evidence which plaintiff's counsel claims shows that counsel for defendant (1) concealed evidende and (2) caused certain witnesses to testify in an untruthful manner. These are serious charges.

"The charge that defendant's counsel concealed evidence relates primarily to the incidents regarding Mrs. Samuelson. There is no evidence, in my opinion [Rep. Tr. 2513; emphasis added] sufficient to justify the conclusion that

defendant's counsel knowingly withheld information of Mrs. Samuelson's identity or knowledge from plaintiff's counsel. I think the evidence shows that defense counsel revealed the identity of Mrs. Samuelson to plaintiff's counsel shortly after her identity became known to them. I also think the evidence shows that defendant's counsel did not know that Mrs. Samuelson identified herself as the person who made certain entries in the hospital records until the day she testified here. If my opinions are correct -- and you must remember that you and not I are the final judges of what the evidence shows -- then it follows that there has been no concealment of evidence as charged.

"The second charge -- that defense counsel was able to get many of the witnesses to testify falsely -- also seems to me not warranted by the evidence.* I saw no evidence which would convince me that any of the expert witnesses in the case, whether presented by plaintiff or defendant, testified to other than what was their honest opinion on the medical aspects of the case. The fact that the opinions varied somewhat from one another

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*The Court of Appeal stated (page 11, lines 7-10, Appendix "A" hereof) "The jury herein might have decided that defense witnesses were being coached by defense counsel; some of their testimony did change somewhat after lunch breaks and other conferences."

is, to my mind, an insufficient basis to conclude that counsel for either side improperly influenced the witness. The same is true of the fact that counsel conferred with witnesses ahead of time or agreed to pay the expert witnesses an expert witness fee, as both counsel have done with their expert witnesses. A lawyer should talk to his witness ahead of time and no impropriety should be presumed from that fact alone. Doctors are [Rep. Tr. 2515] professional men whose stock in trade is their time and expertise. It is customary to pay an expert witness fee tc a doctor and the evidence is clear that both counsel have followed this custom. In my opinion, there is no evidence of any substance that defense counsel improperly influenced any witness to testify to other than what the witness held as his opinion or other than what that witness believed the facts were.

"My comments are intended to be advisory only and are not binding on you as you must be the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses.

"You may disregard any or all of my comments if they do not coincide with your views of the evidence and the credibility of the witnesses."

A general verdict was returned in Respondent's favor.

REASONS FOR GRANTING THE WRIT

Contradiction and Rebuttal By the Trial Court of Important Parts of Counsel's Argument to the Jury Is a Gross Unsurpation of the Function of the Jury and Denial of a Litigant's Right to Due Process of Law

It is difficult to imagine a more blatant intrusion by the trial court into the province of the jury than the one embodied in the trial judge's comments on the evidence. Relying upon a constitutional option to ". . . make such comment on the evidence and the testimony as in [the Court's] opinion is necessary for the proper determination of the cause." (Calif. Const. Art. VI, §10.) The trial court in effect told the jury that the evidence and counsel's argument on the issues of concealment of evidence and false testimony were insufficient as a matter of law.

In this case of first impression, this Court has the opportunity to draw the parameters within which a trial court may interpose its view of the evidence between the trier of fact and the natural force and effect of the evidence presented by the parties. Clear boundaries must be erected which show the limits of reasonable judicial

superintendence of a trial, beyond which a trial court may not venture.

From the history of the constitutional grant of power to the judiciary to comment upon the evidence there emerges a definite pattern. All but a few of the cases involving the provision were criminal prosecutions where evidence of guilt was overwhelming. In the small number of civil cases the evidences on either side of the issue of liability was also overwhelming and in nearly all the cases, the comments of the trial court were made during the taking of testimony. In only one reported case, People v. Brock (1967) 66 Cal. 2d 645, did the trial judge introduce his comments by a statement that his authority to do so derived from the Constitution, a practice which places unusual and undue emphasis upon the Court's comments. In a case where such commentary is incorrect the prejudicial effect is literally incalculable. How is it possible to assess the profound effect upon an average juror which the pronouncement of a constitutional mandate has?

In every case in which the trial court made an improper or erroneous comment upon the evidence, appeal courts have reversed. People v. Dail (1943) 22 Cal. 2d 642; People v. Hooper (1949) 92 Cal. App. 2d 524, 207 P. 2d 117, 528-529; People v. Ottey (1936) 5 Cal. 2d 714, 56 P. 2d 193; People v. Frank (1925) 71 Cal. App. 575, 236 P. 189; People v. Mahoney (1927) 201 Cal. 618, 258 P. 607; People v. Yokum (1956) 145 Cal. App. 2d 245, 302 P. 2d 406.

In the single reported case where a trial court contradicted or rebutted a lawyer's argument to the jury, People v. Ottey, supra, the defendant's attorney blithely told the jury to disregard what the trial court would instruct them regardint the law applicable to the case. Such outrageous action obviously warranted an instruction to the jury that they were not to "disregard the statements of t the judge any more than anything else in the case." Under these circumstances, the California Supreme Court held that it was a proper response to the trial lawyer's argument.

There is no mitigation of the trial court's comments found in its statements that the jury may ignore them. "General statements is the charge to the effect that the jury are at liberty to disregard the court's views as to the defendant's guilt or innocence, and to base their verdict on their own conclusions from the evidence, do not cure the fault in the charge of a lack of impartiality in submitting the evidence to the jury, or justify the court in making one-sided recitals of evidence, or in furnishing arguments in behalf of only one side of issues as to which the evidence is conflicting." Steele v. Wardwell (1943) 57 Cal. App. 2d 642. (Citing Guercia v. United States (1933) 289 U.S. 466; United States v. Hosmer (1970) 434 F. 2d 209; United States v. Dunmore (1971) 446 F. 2d 1214; United States v. Murdock (1933) 290 U.S. 389.)

If Due Process means anything at all, it must mean at least that the function and offices of the trial court and jury be exclusive to each,

and that the tinkering by one with the perquisites and duties of the other is on a collision course with what the jury system has come to mean since its vague beginnings in English Common Law to its present embodiment in the Fourteenth Amendment to the United States Constitution. A final clarification by this Court of the extent to which a trial judge may go in attempting to simplify the jury's tasks by commenting on the evidence would effect uniformity in judicial exercise of this constitutional option.

There can be little doubt that the cumulative effect of the trial court's comments on the issues of concealment of evidence and false testimony in the instant case was to indelibly implant in the mind of the jurors the conclusion that Petitioner's evidence and counsel's argument on it were worthless and should be disregarded. If such preemption of the function of the trier of fact is left to stand, then Due Process of Law, as guaranteed by the Fourteenth Amendment to the United States Constitution, shall have been severely eroded.

CONCLUSION

For each of the foregoing reasons, this Petition should be granted.

Respectfully submitted,

WILLIAM JEROME POLLACK

Attorney for Petitioner

APPENDIX "A".

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Gary Brott, a Minor by his Guardian ad Litem, Dora Brott, Plaintiff and Appellant, v. Saint Francis Hospital of Lynwood, a corporation, Defendant and Respondent. 2d Civil 43085, (Sup.Ct.No. SEC 8729-S).

Filed: Jan. 8, 1975.

APPEAL from a judgment of the Superior Court of Los Angeles County. Harry L. Hupp, Judge. Affirmed.

William Jerome Pollack, for Plaintiff and Appellant.

Gibson, Dunn & Crutcher, by John H. Sharer, for Defendant and Respondent.

Gary Brott, a minor, sued St. Francis Hospital of Lynwood, alleging injuries sustained at birth which resulted in his mental and physical retardation. The two doctors involved settled before trial for $85,000. The theory of liability at trial was premised on the negligence of nurses who assisted in the labor room at the time of Gary's birth. The jury entered a verdict for defendant and against plaintiff; judgment was entered, with costs of $2,227.96 to defendant. Plaintiff appeals from the judgment and from various orders entered after judgment concerning witness fees, costs, and the taxing of costs.[1]

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[1]The latter appeal is not pursued in appellant's briefs so will be deemed abandoned.

FACTS:

On December 10, 1958, Dora Brott (appellant's mother and guardian ad litem) began feeling labor pains and visited Dr. Hillecke, who had been treating her during her later stages of pregnancy. He determined that the baby would be born in the breech position; she went to a friend's home and about 2 p.m. went to the hospital. Dr. Hillecke went to see her, ordered x-rays taken, and returned home.

Mrs. Brott was placed in the labor room, where she was periodically examined by nurses on the staff. Some of the results of said examinations were recorded in a portion of the hospital chart.

At 2:30 p.m., Nurse Kendall noted that Mrs. Brott was having contractions every five minutes; that the baby was at station minus two, indicating that the child had not substantially commenced his descent through the birth process; that the fetal heart tones were good; and that Mrs. Brott's cervix was dilated to 1 centimeter. (Full dilation is about 10 centimeters and ordinarily precedes delivery.)

At 3:30 p.m. Nurse Kennedy noted that the contractions were every three minutes; the station was minus one, the dilation was 1 centimeter; the fetal heart tones were good, and the effacement was 60 percent (ordinarily the cervix is 100 percent effaced at the time of delivery.) It was the practice of nurses at the hospital to check the fetal heart tones at least hourly; if those fetal heart tones were within normal limits, they were frequently not recorded in the chart.

Mrs. Brott's bag of waters (sac filled with amniotic fluid that completely encloses the fetus) ruptured at 4:45 p.m. The fetal heart tones were checked, and

Nurse Samuelson (whose relationship to the case allegedly was not known until the day she testified) put a question mark on the labor record. Nurse Samuelson also noted that the cervix was dilated 3 to 4 centimeters. She placed a call to Dr. Hillecke; a call was placed over the intercom for any available physician. Nurse Samuelson then moved Mrs. Brott to the delivery room. Dr. Conover, who responded to the emergency call, arrived at the delivery room within 5 minutes of the call and found that the fetus's feet and legs were visible. He could find no fetal heart tones.

Preparing Mrs. Brott for delivery took Dr. Conover about 5 to 10 minutes. About 10 minutes after he arrived, the cervical dilation was 8 plus. He had great difficulty in extracting the baby, first trying fundal pressure (pushing on the abdomen); then the Mauriceau method (placing finger in child's mouth, the remaining fingers on the child's head, and pulling); and Piper forceps. The delivery occurred at about 5:23 p.m.

It is uncontested that appellant Gary Brott is now severely retarded, cannot care for himself, and has spent much of his life in institutions. The cause of his retardation, however, was at issue in the trial. Drs. Piper and Gabriel testified for appellant that his retardation was due to anoxia (lack of oxygen) at birth. Dr. Fish testified that various congenital anomalies suffered by appellant indicated retardation of a congenital origin. Dr. Menkes, though of the opinion that it is more likely than not that appellant's condition is due to anoxia, opined that it might be due to use of the forceps or to congenital disorders.

Appellant's counsel contended the nursing staff was negligent in not taking fetal heart tones more fre-

quently, claiming they should be taken several times an hour. Testimony of various obstetricians contradicted that contention. In addition, several doctors and nurses testified that it was customary to check fetal heart tones more often than recorded and not always to record them if they were normal.

Appellant additionally contended that the untimed and unsigned entry in the labor room record was made earlier than the time the bag of waters ruptured and that the nurse (determined at trial to be Nurse Samuelson) ignored that entry until some subsequent time. Nurse Samuelson testified that the entries referred to the 4:45 time period; and that never in her nursing experience had she failed to report to a physician her discovery of any questionable fetal heart tones. Appellant supported this claim by arguing that (1) fetal heart tones do not go rapidly from being good to being nonexistent, (2) that dilation of 3 to 4 centimeters must have occurred before 4:45 since the dilation was 8 plus when Dr. Conover arrived, and (3) that Mrs. Brott in her deposition testified the nurse said she saw a foot of the fetus at the time the bag of waters broke, and then knew the position of the child. The first two arguments were refuted by medical testimony. There was no testimony except that of Mrs. Brott to support the third.

Sometime after the birth, the Record Review Committee reviewed Mrs. Brott's and Gary's charts. Over objection, testimony regarding the Committee was admitted, it was later stricken.

CONTENTIONS ON APPEAL:

1. The trial court committed prejudicial error in giving BAJI 15.21 with its modification.

2. There was gross misconduct by defense counsel in telling the jury that appellant settled with Drs. Hillecke and Conover for $85,000 because they were the only two negligent ones and that they paid because they knew they were solely responsible for Gary's condition.

3. There was willful concealment from plaintiff's counsel of the identity, participation, and existence of Nurse Samuelson and of the facts regarding whether or not, and the hours at which, she had checked Mrs. Brott's fetal heart tones.

4. The court committed prejudicial error in striking all of plaintiff's evidence regarding the fact that the charts had been reviewed by two Record Review Committees right after Gary was born.

5. The court committed prejudicial error in refusing to order Dr. Menkes to produce a copy of his second medical report.

In addition to the contentions of appellant, the respondent contends that the action was barred by the statute of limitations.

DISCUSSION:

1. *There was no error in the trial court's giving of BAJI 15.21.*

BAJI 15.21 reads:

"Judge's Comment on Evidence. I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or sug-

gest how you should decide any questions of fact submitted to you.

"If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion.

"At this time, however, and for the purpose of assisting you in properly deciding this case, I am permitted by the Constitution of California to comment on the evidence and the testimony and credibility of any witness.

"My comments are intended to be advisory only and are not binding on you as you must be the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses.

"You may disregard any or all of my comments if they do not coincide with your views of the evidence and the credibility of the witnesses."

After reading that instruction, the trial court commented on the evidence relating to concealment of evidence and alleged untruthful testimony. He stated:

"My comments will be limited to only one aspect of the evidence—that is, the evidence which plaintiff's counsel claims shows that counsel for defendant (1) concealed evidence and (2) caused certain witnesses to testify in an untruthful manner. These are serious charges. In my opinion the evidence does not substantiate either charge.

"The charge that defendant's counsel concealed evidence relates primarily to the incidents regarding Mrs. Samuelson. There is no evidence, in my opinion, sufficient to justify the conclusion that defendant's counsel knowingly withheld information of Mrs. Samuelson's

identity or knowledge from plaintiff's counsel. I think the evidence shows that defense counsel revealed the identity of Mrs. Samuelson to plaintiff's counsel shortly after her identity became known to them. I also think the evidence shows that defendant's counsel did not know that Mrs. Samuelson identified herself as the person who made certain entries in the hospital records until the day she testified here. If my opinions are correct—and you must remember that you and not I are the final judges of what the evidence shows—then it follows that there has been no concealment of evidence as charged.

"The second charge—that defense counsel was able to get many of the witnesses to testify falsely—also seems to me not warranted by the evidence. I saw no evidence which would convince me that any of the expert witnesses in the case, whether presented by plaintiff or defendant, testified to other than what was their honest opinion on the medical aspects of the case. The fact that the opinions varied somewhat from one another is, to my mind, an insufficient basis to conclude that counsel for either side improperly influenced the witness. The same is true of the fact that counsel conferred with witnesses ahead of time or agreed to pay the expert witnesses an expert witness fee, as both counsel have done with their expert witnesses. A lawyer should talk to his witnesses ahead of time and no impropriety should be presumed from that fact alone. Doctors are professional men whose stock in trade is their time and expertise. It is customary to pay an expert witness fee to a doctor and the evidence is clear that both counsel have followed this custom. In my opinion, there is no evidence of any substance that defense counsel improperly influenced any witness

to testify to other than what that witness held as his opinion or other than what that witness believed the facts were."

After commenting on the evidence, he reread the last two paragraphs of BAJI 15.21:

"My comments are intended to be advisory only and are not binding on you as you must be the exclusive judges of the questions of fact submitted to you and of the credibility of the witnesses.

"You may disregard any or all of my comments if they do not coincide with your views of the evidence and the credibility of the witnesses."

Appellant claims that such comment is not authorized and that the trial court made his comments appear to be the law of the case. The court's recitation of the last two paragraphs in BAJI 15.21 refutes the latter contention. As for the former contention, article 6, section 10, of the California Constitution provides in part: "The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." Under this section, the trial court is permitted to analyze testimony and to express its views with respect to the credibility of witnesses. (*Schnear v. Boldrey*, 22 Cal.App.3d 478, 482-483; see *People v. Kagan*, 264 Cal.App.2d 648, 664; *Howarth v. Maroney*, 228 Cal.App.2d 116, 122-124.)

"The facts of each case must determine the nature and extent of the court's observations and the diction and phraseology appropriate thereto. It is not confined to a colorless summation of facts [citation] so long as the jury are directed that notwithstanding such comment, they must determine the credibility of every wit-

ness and the weight to be accorded to his testimony." (*Pomerantz v. Bryan Motors, Inc.*, 92 Cal.App.2d 114, 119.)

The cases cited by appellant[2] involved more than nonpassionate comments on the evidence or did not result in reversible error. Another case cited by appellant, *People v. Yokum*, 145 Cal.App.2d 245, 257, actually did not find reversible error although the trial court had commented by saying he concluded the murder was not in self-defense.

Appellant further contends that by commenting in such a manner, the court was instructing that certain witnesses were presumed to be telling the truth. This argument, after reading BAJI 15.21, is without merit.

2. *There was no prejudicial error in defense counsel's arguments regarding the liability of Drs. Conover and Hillecke.*

This contention is wholly without merit. Appellant's contention briefly stated is that in argument respondent's counsel referred to appellant's settlement with the two doctors and the amount thereof. Appellant claims this was prejudicial error. Appellant clearly and unequivocally stipulated that the court could tell the jury of the settlement and of the amount. Respondent's counsel's utilization of this fact in defense argument was entirely fair comment, and well within the bounds of proper argument. *Shepherd v. Walley*, 28 Cal.App.3d 1079, cited by appellant and declaring such comment to be reversible error is inapposite. In *Shepherd* the offer to stipulate to the fact of settlement did not in-

[2]See, *e.g.*, *People v. Hooper*, 92 Cal.App.2d 524; *People v. Ottey*, 5 Cal.2d 714; *People v. Dail*, 22 Cal.2d 642; *People v. Frank*, 71 Cal.App. 575; *People v. Mahoney*, 201 Cal. 618.

clude as a part thereof the amount. There was no reason in *Shepherd* to admit the evidence of the amount. The agreement to reduce any jury verdict by such amount could have been carried out by simple subtraction after the verdict had been rendered in that case. (Additionally at bench there was no objection to counsel's closing arguments. There is no prejudicial error. (See *Tobler v. Chapman*, 31 Cal.App.3d 568, 577; *Sabella v. Southern Pac. Co.*, 70 Cal.2d 311, 318.)

3. *The issues of concealment of the identity of Nurse Samuelson and alleged untruthfulness of other testimony was a factual matter to be determined by the jury.*

Appellant contends that immediately after he was born, the defendant began the concealment of the identity of Nurse Samuelson and the hour at which she had checked Mrs. Brott's FHTs. He also contends that defense counsel improperly influenced the testimony of witnesses.

It is true that the hospital in its interrogatories answered that it did not know the identity of the nurse who had made the unsigned, untimed entry. It is also true that in his opening statement, respondent's counsel mentioned that respondent did not know which nurse called Dr. Hillecke at 4:45. However, appellant was given Nurse Samuelson's name as one of the six other nurses who had attended Mrs. Brott; her address along with those of other nurses was given two days before the trial was scheduled to begin. Appellant could have contacted her but apparently did not do so.

After Nurse Samuelson had testified, appellant's counsel moved to strike the testimony on the grounds that respondent had misled him in the answers to inter-

rogatories; he asked the trial court to defer ruling on the motion. Before the court ruled, counsel withdrew the motion to strike. Since there was no objection, the evidence was admissible.

The credibility of witnesses is a matter for the trier of fact. The jury herein might have decided that defense witnesses were being coached by defense counsel; some of their testimony did change somewhat after lunch breaks and other conferences. However, there was no reason that the jury would have to find chicanery; rather, they might well have realized that several years had passed since Gary's birth and the trial, resulting in hazy memories and some internal inconsistencies in testimony. An appellate court does not reweigh the facts or the credibility of witnesses.

4. *The court did not commit prejudicial error in striking all of appellant's evidence regarding the fact that the charts had been reviewed by Record Review Committees after Gary was born.*

Appellant's counsel agreed with the court that the uncontradicted testimony was to the effect that the Medical Records Committee does not review hospital records for completeness of nurses' portions of the record. Therefore, his theory that the records would contain all of the fetal heart tone readings by virtue of such review was without foundation.

However, counsel then argued that the evidence regarding the testimony should be included to show that the hospital should have conducted an investigation in 1958 when the memories of the hospital staff were fresh. The trial court decided that such evidence was irrelevant to the issues in the case; considering that the review went only to the completeness of

the doctors' entries (and the conduct of the doctors is not an issue in this case) such evidence is irrelevant and was properly excluded.

Appellant in his brief cites no cases supporting his proposition. Neither does he indicate any prejudice from the striking of the testimony regarding the review committee.

5. *The court did not commit prejudicial error in refusing to order Dr. Menkes to produce a copy of his second medical report.*

Dr. Menkes was called as a witness by appellant and questioned as to the first examination he conducted of Gary Brott. Appellant wanted respondent to produce a second report made by Dr. Menkes after he had examined some of appellant's medical records alleging that the report "undoubtedly contained the doctor's opinion that the cause of plaintiff's condition was hypoxia occurring while a fetus in *utero*." Respondent on the other hand contends that the report is part of his work produce and is therefore privileged.

Respondent's counsel, outside the presence of the jury, testified that he did not intend to call Dr. Menkes as a witness. He further testified that the second report was made to assist him in understanding various medical problems and examining possible causation issues.

Subsection (b) of section 2016 of the Code of Civil Procedure provides in part: "The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice . . . ." The second report would fall under this work product privilege.

(See *Sanders v. Superior Court*, 34 Cal.App.3d 270, 276-280.)

Appellant contends, however, that since Dr. Menkes used the report prior to trial to refresh his recollection, the report must be produced. Subdivision (a) of section 771 of the Evidence Code reads:

"[I]f a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an *adverse party* and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken." (Emphasis added.) Since Dr. Menkes was called as a witness by appellant, appellant is not the "adverse party" to which the statute refers.

Furthermore, appellant has failed to show any prejudice. Dr. Menkes' testimony was on the whole favorable to appellant; he testified that he felt it more likely than not that Gary's present condition is due to perinatal anoxia. Appellant was given the opportunity to take Dr. Menkes' deposition but cancelled the appointment.

6. *We need not consider the statute of limitations issue.*

Respondent claims that there was evidence produced that Mrs. Brott knew of or suspected the cause of Gary's retardation several years before she filed suit and that this action is therefore barred by the statute of limitations. Appellant produced an affidavit by one of the jurors stating that the jury never even deliberated on the issue of the statute of limitations. Because of our resolution of the other issues presented on the appeal,

resulting in affirmance of the judgment, we need not consider the issues raised by this statute of limitations question.

The judgment is affirmed.

NOT FOR PUBLICATION

Beach, *J.*

We concur:

Roth, *P. J.*

Fleming, *J.*